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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ELMER HIGDON,

Appellant,

v.

OLYMPIC AIR POLLUTION CONTROL
AUTHORITY,

Respondent.

PCHB No. 90-123

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This hearing was held before the Pollution Control Hearings Board, November 26, 1990, in Lacey, Washington, on the appeals of two Notices of Civil Penalty Assessments issued to the appellant Elmer Higdon, by the Olympic Air Pollution Control Authority (OAPCA). Number 1297-87 was dated April 29, 1990, in the assessed amount of a one-hundred seventy-five dollar (\$175.00) fine, and number 1296-87, dated May 1, 1990, in the assessed amount of a four-hundred dollar (\$400.00) fine. They were both for alleged violations of WAC 173-433-130(1) and (2), involving "Emission of Air contaminants detrimental to persons or property and odors."

Annette McGee presided, with Board Member Harold Zimmerman being present for part of the hearing and reviewing the record.

Mr. Higdon appealed the assessments on June 26, 1990.

On July 16, 1990, Fred Gentry, Attorney for OAPCA moved to

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1 dismiss the appeal. On August 21, 1990, Chair Judith A. Bendor and
2 Member Harold S. Zimmerman, Pollution Control Hearings Board, denied
3 the motion.

4 At the hearing on November 26, 1990, Elmer Higdon represented
5 himself. Attorney Fred D. Gentry, represented OAPCA. The proceedings
6 were reported by Bibi Carter, Court Reporter for Gene Barker and
7 Associates.

8 Witnesses were sworn in and testified. Exhibits were admitted
9 and examined. From the testimony heard and exhibits examined, the
10 Board makes the following:

11 FINDINGS OF FACT

12 I

13 Mr. Elmer Higdon lives at 1129 Tremont Street, Port Townsend,
14 Washington in a one-story home located in a southerly direction,
15 across the street from Jennifer Blomgren, who lives in a two-story
16 home, at 1070 Tremont Street, Port Townsend. Mr. Higdon has lived in
17 his residence for about ten years. Ms. Blomgren has lived in hers for
18 about three years.

19 II

20 The wind blows frequently in this area, and the Blomgren
21 residence appears to be located downwind from the Higdon home. The
22 air in the Blomgren home and around the property is very often quite
23 smokey, especially at night.

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III

Mr. Higdon chooses to heat his home with an automatically controlled wood furnace, even though the house is wired for electric heat. The wood that he uses is left out in the weather, uncovered, until he puts it inside before stoking the furnace. In the past, he has been gone from the home frequently, and the furnace was left to operate by the automatic mechanisms, apparently causing excessive amounts of smoke and odors in the neighborhood.

IV

Jennifer Blomgren is sensitive to smoke and is stressed because of the smoke and odors.

V

Because of the personal observations and continuous complaints of excessive smoke and odors that OAPCA had been receiving, James P. Werner, Monitoring Technician Inspector from OAPCA, wrote Mr. Higdon a follow-up letter from earlier conversations. In the March 13, 1989, letter Mr. Werner suggested the following in trying to assist Mr. Higdon with his problem:

Properly seasoned fire wood is essential for a clean-burning wood stove. Wood stove regulations state that only properly seasoned fire wood be burned in wood stoves. Properly seasoned wood contains twenty percent or less water. A stove that burns clean and efficiently emits only heat waves that can be observed with the naked eye.

1 Secondly, I observed smoke from your chimney impacting
2 the neighborhood. You need to correct the down draft
3 problem with your smoke plume. In some cases, a stack
4 extension can eliminate this problem. This is what you
5 need to work on to achieve, for yourself and your
6 neighbors, breathing clean air. I suggest that you
7 observe your chimney from outside for fifteen to twenty
8 minutes after start up or after refueling your stove.
9 When observing smoke, try to get a contrasting
10 background such as a green tree, to view your smoke
11 against. Then adjust your stove damper until a clearer
12 looking chimney smoke is achieved.

13 Thank you for your cooperation and the changes that you
14 might make in helping to keep our air clean. If you
15 have any questions, please contact this office at
16 1-800-422-5623.

17 VI

18 Prior to registering formal complaints to the OAPCA, Ms. Blomgren
19 tried to talk to Mr. Higdon about the smoke problem and the impacts to
20 her home and property.

21 VII

22 The Olympic Air Pollution Control Authority issued the first
23 Notice of Violation for emission of air contaminants that directly
24 impacted the neighbors which occurred on 12-27-89. This was a warning
25 notice. The OAPCA also issued a second Notice of Violation for
26 emissions of air contaminants, that directly impacted neighbors
27 causing detriment to health safety or welfare occurring on 12-29-89.
The second notice carried with it, a civil penalty of fifty dollars
(\$50.00), with twenty-five dollars (\$25.00) suspended.

1 Enclosed with the Civil Penalty Notice of Violation was a letter
2 from Charles Peace, Olympic Air Pollution Control Officer, stating
3 that the next violation could be assessed between one hundred fifty
4 (\$150.00) and two hundred fifty dollars (\$250.00). A further
5 violation would be a four hundred dollar (\$400.00) penalty.

6 Mr. Peace also stated the following in this letter:

7 It appears that your burning activity in your
8 particular location is not acceptable to your
9 neighbor. I would suggest that you look for other
10 alternatives to heat your home in order to avoid future
enforcement action. A good information resource is the
Washington Energy Extension Service. Their phone
number is 1-800-962-9731.

11 You are hereby advised that if you choose to not pay
12 the \$25.00 fine you may appeal for relief by making a
13 request for a hearing directly to the State of
Washington Pollution Control Hearings Board, 4224 6th
14 Avenue, Building 2, Lacey, Washington 98504, in
accordance with Chapter 43.21B RCW and Rules WAC
15 37-108-075, and WAC 173-08-080. The request for appeal
and for a hearing must be made in writing and served
16 within thirty (30) days after receipt of this notice
upon both the pollution control hearings board (address
17 above) and Olympic Air Pollution Control Authority, at
120 East State Avenue, Olympia, Washington 98501. If
18 the penalty amount is not paid nor a hearing requested,
the Authority shall bring action in the Superior court
of the county in which the violation occurred.

19 We look forward to your cooperation in meeting air
20 quality standards.

21 The fine was paid.

22 VIII

23 Donovan Rafferty, Olympic Air Control Technician/Inspector set up
24 monitoring devices in the area between November, 1989, and April 1,
25

1 1990, because of the Blomgren complaints. Results indicated that a
2 problem existed in the neighborhood with the amount of particulates
3 being higher than allowed by regulations. From the monitoring and
4 observation, it appeared that excessive smoke and particulates were
5 being emitted into the air from the Higdon furnace.

6 IX

7 Therefore, on April 29, 1990, at about 2:00 p.m., Inspector James
8 Werner charged Mr. Higdon with a Notice of Civil Penalty, number
9 1297-87 violating WAC 173-433-130(1) and (2), resulting in the second
10 penalty fine and third notice of violation, (the first one being a
11 warning). This was a one hundred seventy-five dollar (\$175.00)
12 penalty in accordance with Section 3.27, Regulation One of the OAPCA.
13 The notice stated:

14 *Formal complaints from neighbors that solid fuel*
15 *burning device directly impacts their property; and (2)*
16 *odors produced from the device interferes with the use*
and enjoyment of his property.

17 X

18 On May 1, 1990, at about 10:00 a.m., Inspector James Werner
19 issued the third Notice of Civil Penalty Assessment, number 1296-87,
20 in the amount of a four hundred (\$400.00) dollar fine for the same
21 reason as above.

22 XI

23 Any Conclusion of Law deemed to be a Finding of Fact is hereby
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25
26

1 adopted as such. From these Findings of Fact, the Board makes these:

2 CONCLUSIONS OF LAW

3 I

4 The Board has jurisdiction over these persons and matters.
5 Chapters 43.21B and 70.94 RCW.

6 II

7 The Board concludes that the appellant violated WAC
8 173-433-130(1) and (2).

9 WAC 173-433-130(1) and (2) states:

10 WAC 173-433-130 General emission standards. (1)
11 Emission of air contaminants detrimental to persons or
12 property. No person shall cause or permit the emission
13 of any air contaminant from any solid fuel burning
14 device, including any air contaminant whose emission is
15 not otherwise prohibited by this chapter, if the air
16 contaminant emission directly impacts the property of
17 another so as to cause detriment to the health, safety,
18 or welfare of a person, or cause damage to property or
19 business. Direct impact means that emissions from an
20 identifiable solid fuel burning device are present in
amounts which reasonably constitute a threat to the
health, safety, or welfare of a person(s).

21 (2) Odors. Any person who shall cause or allow the
22 generation of any odor from any solid fuel burning
23 device which may interfere with any other property
24 owner's use or enjoyment of his property must use
25 recognized good practice and procedures to reduce these
26 odors to a reasonable minimum.

27 The Board further concludes that the smoke was detrimental to Ms.
Blomgren's welfare and unreasonably interfered with her enjoyment of
life and property, violating the statute.

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III

After the first warning and Notice of Violation and Penalty Mr. Higdon should have attempted to take steps to try to alleviate the smoke problem by encompassing the suggestions written in the violation of notification and in the letter by James P. Werner on March 16, 1989. Apparently these suggestions were not taken seriously.

IV

The amount of penalty was based upon several factors, including past history of violations, efforts made by Olympic Air Pollution Control Authority in suggesting possible solutions to the smoke problem, the severity of the problem and Section 3.27 Regulation 1 of the Olympic Air Control Authority.

Once aware of the problem, Mr. Higdon should have taken steps to lessen the impact on his neighbors. Therefore, we conclude and affirm that the one-hundred seventy-five dollar (\$175.00) fine in violation number 1297-87 and the four-hundred dollar (\$400.00) fine in violation number 1296-87 be upheld, with the four-hundred dollar (\$400.00) fine being suspended, provided that there are no unexcused air pollution violations within the next two years.

V

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this:

1 ORDER

2 Olympic Air Pollution Control Authority's Notice and Order of
3 Civil Penalty 1297-87 (\$175.00) is AFFIRMED. Notice and Order of
4 Civil Penalty 1296-87 (\$400.00) is AFFIRMED, provided that it is
5 SUSPENDED on the condition that appellant has no unexcused air
6 pollution violations within the next two years.

7 DONE this 10th day of January, 1991.

9 POLLUTION CONTROL HEARINGS BOARD

10 Annette S. McGee
11 ANNETTE S. MCGEE, Member

12 Harold S. Zimmerman
13 HAROLD S. ZIMMERMAN, Member